

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EDWARD MACKENZIE

PETITIONER

v.

UNITED STATES OF AMERICA

RESPONDENT

Case#13-cr-10149-FDS

FILED
IN CLERKS OFFICE
2020 MAY 28 AM 10:09
U.S. DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MOTION FOR RECONSIDERATION OF PETITIONER'S

MOTION PURSUANT TO 18.U.S.C. §3582

INTRODUCTION:

Now comes, EDWARD MACKENZIE respectfully asking that this court reconsiders his request for compassionate release, because the conditions at the prison has changed tremendously and his health conditions is still a factor being considered by the Bureau of Prisons as a risk factor to qualify inmates for early release, which makes his claim that there exist "extraordinary and compelling reasons for a reduction of his sentence. In denying Mr. Mackenzie's motion the court stated "In sum, the evidence in the record does not support a finding that defendant's medical conditions or prison conditions make him especially vulnerable to infection", "In summary, based on the seriousness of defendant's offense, the relatively low portion of his 144-month sentence that he has served, the danger to the community if he were to be released, the lack of qualifying family circumstances, and the defendant's failure to show that he is materially more at risk for a serious medical condition

due to COVID-19 pandemic than the general prison population, the Court does not find that "extraordinary and compelling reasons" warrant a reduction of his sentence". The infection at FMC Devens continues to rise(1 death three weeks ago, 10 inmates and two staff on Friday May 15, 2020, Tuesday May 19, 18 inmates and two staff, Wednesday May 20, 2020, 20 inmates, two staff and one death and Thursday May 21, 21 inmates, 2 staff and one death).

The BOP at FMC Devens mitigation efforts continues to fail tremendously.

Mr. Mackenzie renews his position, which he first presented to this court, that he would like his sentence modified, so that he can serve the remainder of his sentence in Home Confinement, because the living arrangements and conditions at FMC Devens (CAMP), creates an inherent risk of him contracting COVID-19, which could imperil his survival.

This is so because the Bureau of Prisons at FMC Devens (CAMP) has failed to adequately implement procedures to protect Mr. Mackenzie from contracting the COVID-19 virus and also failed to follow CDC guidelines as explained and highlighted below:

Moreover the efforts made by FMC Devens (CAMP)' to prevent the virus from spreading has shown to be insufficient by the rapid spread of the virus at the medical center.

Additionally, the court referenced that the BOP

independent review, found Mr. Mackenzie ineligible for early release under the Elderly Offender Program of the First Step Act and the CARES Act because of his prior conviction for armed robbery, a serious and violent offense that weighs heavily against home detention. That comparison is inaccurate because the First Step Act preclusion for violence in the elderly program was intended by Congress and is required by statute.

The CARES Act is different, it modified 3624(c) expanding the Home Confinement authority to the maximum amount of time and in administering that law, attorney General Barr stated specifically that the BOP should as one of the criteria's " The inmate's crime of conviction, and assessment of the danger posed by the inmate to the community". This court did not look to the crime of conviction but rather, looked at Mr. Mackenzie's criminal history, which he admits is not appealing, but in the context of COVID-19, he faces a risk of contracting a serious virus, from which he is not expected to recover.U.S.S.G.§1B1.13.

The Bureau of prisons have estimated Mr. Mackenzie's projected release date of February 12, 2023 a little under three years.

RECENT DEVELOPMENTS AT FMC DEVENS:

On May 20, 2020 the Bureau of prisons at Devens updated the Bureau's website and reported 20 infected inmates, two staff, and one death, this information, Mr. Mackenzie states is even worst than what is reported, because the Bureau's own staff are reporting that there is a significant amount of inmates who are

COVID -19 positive and testing is being rationed. This concealment led court(s) in this district and other districts to believe that FMC'S Devens efforts were sufficient to prevent the disease from becoming a threat to Mr. Mackenzie's health, which could cause him to suffer from a serious medical condition which he is not expected to recover and neither would he be able to provide self care at the place where he is incarcerated

This is not the end here...on May 13, 2020 the Warden of the institution testified at a compassionate release hearing related to an FMC inmate, Robert Pena and notably when asked by the court how many inmates were infected, he did not know the answer or answered incorrectly. That hearing is compelling, it shows that the administration at Devens is taking measures to undermine the magnitude of infections at the institution rather than being candid with the court(s). See United States v. Pena Crim. No. 16-10236-MLW (D. Mass. May 15, 2020), (granting compassionate release and modifying Mr. Pena's sentence.), also see United States v. John Dimenna Crim. No. 3-17-cr-202(VAB) (D. Conn. May 11, 2020) (granting compassionate release to Mr. Dimenna and noting that FMC Devens (CAMP)' was only reporting 1 death at that time.', United States v. Frankie Hoover (D. Vt. May 18, 2020) (releasing Mr. Hoover based on his medical conditions and the conditions at FMC Devens), United States v. William Bischoff Crim. No. 11-cr-196-01-JD (D. Maine May 19, 2020), (releasing Mr. Bischoff based on his age and the conditions at FMC Devens). Indeed courts in this district and

other district are beginning to see and understand the magnitude of FMC Devens shortcomings, by failing to follow the instructions given to the BOP by Attorney General, William Barr.

In Mr. Mackenzie's pending motion, he was unable to present the facts as available now to this court, concerning Devens inability to maintain a safe environment to protect Mr. Mackenzie from contracting the deadly virus. Indeed Devens has fallen short of doing so:

Devens has not provided sufficient space for social distancing

The inmates at the camp are housed in an open dormitory containing 64 bunk beds with no cells or other means of isolating or social distancing;

Devens has only started testing inmates at the CAMP on May 20, 2020, at the CAMP for COVID-19.

Devens has not been keeping the soap and hand sanitizer filled;

Not having sufficient disinfectant for the inmates to clean and disinfect their living quarters, actually on Friday May 15, 2020, the CAMP counselor took all of the disinfectant bottles from the inmates;

There are 10 sinks and 9 toilets and 16 showers (only 12 of the showers work) for all 90 inmates.

The showers are cleaned once in the early morning and used an average of at least 8-10 times daily, without further deep cleaning.

There now exist a plastic wall dividing the showers. This wall could easily act as a surface for the virus to nest, because it was done without any scientific or medical intervention.

The eating arrangements are not practical as they may seem, although the staff at FMC Devens (CAMP) tried to stagger the sittings, with limited space it still makes social distancing impractical. There are only six tables each with 12 seats (6 on each side). The tables are oval shaped with the two center seats on each side being approximately 3 feet apart and the four other seats being 1.5 feet apart. In order to social distance the CDC has recommended being 6 feet apart;

The TV room where the inmates sit and watch TV is also impractical to social distance. The chairs are lined up right next to each other and the inmates sit next to each other while watching TV. The TV room is not cleaned or sanitized during the day;

There are four phones and four computers available for all inmate use, the phones and computers are disinfected once per day;

The inmates have been given mask, which was made by UNICOR, they do not fit properly, the inmates cannot breathe through these masks, they are not made for the purposes intended, and the disposable mask must be worn for 10 days;

The staff from Devens went to the Federal Bureau of prison in Danbury to assist with the outbreak. After returning

the staff had the inmates clean the infected vehicles, without proper PPE's. Shortly after the staff returned from Danbury, the outbreak started at FMC Medical Center;

There is no regards for the inmates health, because staff are afraid to clean the infected vehicles so they bring the vehicles to the CAMP for the inmates to clean;

Inmates are used as door handlers at the medical center and then those same inmates return to the CAMP after being exposed to hundreds of staff which we now know some of whom are infected;

The outbreak is growing very fast, because in addition to what is now being reported on the BOP's site, there are unconfirmed reports that the numbers could be as much as 25 inmates, 3 staff and 1 death, with many more symptomatic inmates.

Mr. Mackenzie works in the kitchen at the CAMP, where he interacts with all inmates and many staff, this is the risk he is primarily concerned about, because staff at the CAMP also work at the medical center, giving rise to the possibility for cross infection.;

The spread of the virus is rising exponentially, because Devens concealed the fact that there were infected inmates at the medical center. The present contingency plan is to lock down the prison CAMP and confine the inmates to tighter living quarters, subjecting all of the inmates to exposure. The rapid spread of the virus is the talk amongst staff and inmates,

who both fear for their lives and well being. It can no longer be accepted that Devens is doing an extraordinary job, because the evidence tells a different story.

Even inmates who are released to Home Confinement or who are released based on their statutory release dates are sent to quarantine in the SHU at the medical center for 14 days; which makes absolutely no sense from a risk standpoint, because the medical center is the epicenter of the disease at the prison. This could potentially cause the inmate to be infected.

FMC DEVENS (CAMP) CONDUCT IS "DELIBERATELY INDIFFERENT" TO THE ATTORNEY GENERAL'S INSTRUCTION.

The attorney general instructed the Bureau of Prisons to start releasing inmates based on the criteria Mr. Mackenzie stated in his original petition. The BOP has modified that criteria and even with that extensive modification, Mr. Mackenzie is still eligible for Home Confinement.

The Supreme court has recognized that government authorities may be deemed "deliberately indifferent to an inmate's current health problems" where authorities ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" including "exposure of inmates to a serious symptoms. Helling v. McKinney, 509 U.S. 25, 33, 113 S. Ct. 2475 (1993)". In the context of Mr. Mackenzie's claim, COVID-19 is very likely to cause a serious illness and cause needless suffering in the next week or month, because the virus is already present at the prison. The

risk of contracting COVID-19 in tightly -confined spaces, especially jails, is now exceedingly obvious. It can no longer be denied that petitioners like Mr. Mackenzie is caught in the midst of a rapidly-unfolding public health crisis, needing urgent judicial intervention.

CONCLUSION:

As Mr. Mackenzie concludes he ask that the court recognize the magnitude of FMC Devens failure to protect the inmate population.

Mr. Mackenzie recognizes that he lived a past life for which he is not proud off, he apologizes to this court for those actions, and he makes no excuses. At sentencing this court has already considered his criminal history. He states that it was never the intention of the court to impose a death sentence, which he now faces, if this court does not release him to a safer environment. He ask the court to think about conditions which the court could find suitable, to protect the community if the court believes so.

Additionally, the inherent risk he is exposed to from which he may not recover and in doing so he states that the BOP at Devens will not be prejudiced if this court should grant, Mr. Mackenzie's motion for compassionate release.

Respectfully Submitted

EDWARD MACKENZIE



Federal Medical Center, Devens -9-

MA

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May 20, 2020

CERTIFICATE OF SERVICE

I EDWARD MACKENZIE certify, that on May 20, 2020 I Mailed a copy of this motion to the Clerk of courts for filing by First Class Mail, United States Postal Service and the government will be notified electronically.

Respectfully

EDWARD MACKENZIE

May 20, 2020

